BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**HURLEY EDUCATION ASSOCIATION**

and

**HURLEY SCHOOL DISTRICT**

Case 53
No. 64120
MA-12814

**Appearances:**

**Gene Degner**, Director, Northern Tier UniServ, 1901 West River Street, P.O. Box 1400, Rhinelander, Wisconsin 54501-1400, appearing on behalf of the Association.

Weld, Riley, Prenn & Ricci S.C., Attorneys at Law, by **Attorney Kathryn J. Prenn**, 3624 Oakwood Hills Parkway, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, appearing on behalf of the District.

## ARBITRATION AWARD

The above-captioned parties, herein "Association" and "District" or "Employer," are signatories to a collective bargaining agreement providing for final and binding arbitration. Pursuant thereto, the undersigned was appointed as Arbitrator. Hearing was held on March 23, 2005, in Hurley, Wisconsin. The hearing was transcribed and the parties thereafter filed briefs that were received by June 3, 2005.

Based upon the entire record and arguments of the parties, I issue the following decision and Award.

## ISSUES

The parties were unable to stipulate to the issues. The Association poses the following issues:

1. Did the District violate the collective bargaining agreement when it allowed a voluntary overload assignment to go to the least senior member of the special education department?

2. If so, what is the appropriate remedy?

The District frames the issues in the following manner:

1. Did the District violate the collective bargaining agreement when it assigned James Kivisto to teach a sixth class, i.e. grade 6 physical education for the 2004-2005 school year?

2. If so, what is the appropriate remedy?

Having reviewed the entire record, I adopt the District's framing of the issues.

## FACTUAL BACKGROUND

### General Background

The Charter school opened in 2000. It serves grades 6-12 in the District, enrolling students who are gifted and talented, at risk, and behaviorally challenged. It provides a full-service, technology-based alternative education program for those students whose needs are not being fully met in the traditional education setting.

Mike DeRoehn was hired as a Charter school teacher for the 2001-2002 school year. He taught four (4) Charter classes, one (1) physical education class, had noon duty and one (1) preparation period. Colleen Dreger was a full-time EBD teacher in the high school during that school year. David Betlewski had three (3) Charter classes, one (1) physical education class and a School-to-Work class.

DeRoehn left the employment of the District prior to the 2002-2003 school year. In his place, the District hired James Kivisto to teach four (4) Charter classes plus noon duty and a 6th grade physical education class. Betlewski had the same schedule as he did in the 2001-2002 school year. Dreger also left the District prior to the start of this school year. At that point the District needed to consolidate the at-risk, Charter and Ed classes. Instead of having three teachers, there were two teachers (Betlewski and Kivisto) left to perform these duties.

Betlewski left prior to the 2003-2004 school year. The Charter and ED services were consolidated into Kivisto's position at the time and he taught five (5) Charter classes, plus one (1) 6th grade physical education class. He also had a preparation period.

### 6th Grade

The District moved 6th grade from the elementary school to the middle school, effective with the start of the 2001-2002 school year. The parties did not bargain over the impact of this change.

**Facts Giving Rise to the Instant Dispute**

Mary Tiziani ("Grievant") is one of the District's special education teachers. Her schedule for the 2004-2005 school year included five (5) classes, a study hall assignment and a preparation period. Thus, she did not receive any additional compensation.

During the process of developing the schedule for the 2004-2005 school year, it became apparent to the District that the grade 6 physical education schedule could not be met without assigning Kivisto a sixth class. The sixth class was the grade 6 physical education assignment. The grade 6 class was not part of Kivisto's regular teaching load on the preliminary schedule for the 2004-2005 school year, but was only assigned to him after all other scheduling alternatives were explored.

On September 3, 2004, the Grievant filed a grievance asserting that she should have been given a sixth class because of her seniority. The Grievant is not certified to teach physical education.

## PERTINENT CONTRACTUAL PROVISIONS

ARTICLE 5 – MANAGEMENT RIGHTS

It is recognized that the Employer retains the rights of possession, care, control, and management that it has by law, and that the Employer will continue to retain the rights and responsibilities to operate and manage the school system, its programs, facilities, properties, and employee activities. It is recognized that these express rights include, but are not limited to, the following operational and managerial rights:

1. To direct all operations of the school system. To plan, direct, and control school activities.
2. To establish and require observance of current reasonable work rules and schedules of work, and to establish new rules and regulations.
3. To determine the financial policies of the District.
4. To maintain effective and/or efficient school system operations.
5. To determine the educational policies of the school district.
6. To determine the location of the schools and other facilities, including the right to establish new and to relocate old facilities.
7. To determine the supervisory and administrative organization of the school system and to select the employees to fill those positions.
8. To determine safety, health, and property protective measures for the welfare of students and employees.
9. To direct and arrange the teaching staff, including the right to hire, promote, transfer, schedule and assign, suspend, discharge, or discipline teachers.

10. To determine the size of the teaching staff, policies affecting the selection of teachers and standards for judging teacher performance.
11. To create, combine, modify, or eliminate teaching positions.
12. To determine methods of instruction, selection of teaching aide and textbooks and materials, class schedules, and hours of instruction.
13. To contract through CESA for goods and services.

The Employer retains the right to exercise these functions during the term of this Agreement, except when such functions and rights are inconsistent or restricted by the terms of this Agreement. It is essential that such functions and rights conform with state and federal statutes, laws, and administrative guidelines.

The Employer recognizes its obligation to bargain the impact of any changes in hours, wages, and/or conditions of employment during the terms of this Agreement.

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ARTICLE 8 – GRIEVANCE PROCEDURE

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2. Procedure: Grievances shall be handled as follows:

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F. If a mutually satisfactory agreement is not arrived at this level, the Hurley Education Association or the Employer may request the Wisconsin Employment Relations Board to function as an arbitrator in the dispute, within thirty (30) days of the written decision in Part E above. The decision of the arbitrator, if made in accordance with his jurisdiction and authority under this agreement, will be accepted as final by the parties to the dispute and both will abide by it. Nothing in the foregoing shall be construed to empower the arbitrator to make any decisions amending, changing, subtracting from or adding to the provisions of the agreement. Procedures at this step are provided for in Section 2, 111.70(4) of the Wisconsin Statutes. Cost of this procedure will be divided equally between the Association and the Employer.

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ARTICLE 10 – CONDITIONS OF EMPLOYMENT

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2. The School Year and the School Day

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D. Instruction:

1. All full-time teachers of grades 7-12 shall be assigned to five (5) periods of classroom teaching or supervisory duties such as study halls, cafeteria, etc., and one (1) supervisory period and one (1) preparation period. The employer may assign a sixth ($6^{th}$) class in lieu of the supervisory period and the teacher is compensated at an additional 10% of the BA Base. The voluntary assignment shall start with the most senior qualified teacher and the involuntary assignment shall be given to the least senior certified teacher, provided it does not cause a scheduling conflict. A side letter of agreement shall be developed by the parties during the 1999-2000 school year regarding Block Scheduling.

## POSITIONS OF THE PARTIES

### Association's Position

The Association basically maintains that the Grievant should have been awarded the overload ($6^{th}$ class). In support thereof, the Association first argues that the overload was a special education class which the Grievant was qualified to teach. The Association next argues that this was a voluntary assignment which should go to the most senior certified teacher (the Grievant). The Association further argues that the District did not do everything possible to avoid scheduling conflicts so that the Grievant could have been given the $6^{th}$ class.

The Association acknowledges the District's right to exercise its management rights herein but cautions that the exercise of such rights has to be consistent with the terms of the collective agreement, particularly Article 10, Conditions of Employment, Section 2.D.1. which puts some parameters on the assignment of teacher work load and provides additional compensation in the event a teacher is assigned a sixth class in lieu of a supervisory period.

Finally, the Association rejects the District's argument that the requested remedy is beyond the scope of the arbitrator's authority. In this regard, the Association claims that the Arbitrator only needs to determine the contract was violated, the Grievant should have had the $6^{th}$ class, the Grievant should have received her due compensation, and order such a remedy.

**District's Position**

The District argues that its decision to assign Kivisto to a 6th class was within the District's expressly reserved and inherent management rights and that it has the sole discretion with respect to the exercise of those rights, unless its action is arbitrary, capricious or taken in bad faith. The District opines that its decision to assign the grade 6 physical education class was not arbitrary, capricious or taken in bad faith.

The District also argues that the assignment was done in a manner consistent with Article 10, Section 2.D.1.

The District further argues that the requested remedy is beyond the scope of the arbitrator's authority because Article 8, Section 2.F. says the arbitrator cannot amend or change the agreement. The District maintains that the Grievant's solution that she should get the additional class is beyond the arbitrator's authority because it usurps the Board's right to act as it did herein and requires a finding that the District has violated the contract when there is no such violation.

Finally, the District argues that the Grievant was not certified for the assignment, that there was no need for an additional class in the Grievant's area (special education) and that there was no student need requiring the assignment of a 6th class to the Grievant, hence no scheduling conflict.

For the above stated reasons, the District requests that the Arbitrator dismiss the grievance in its entirety.

## DISCUSSION

At issue is whether the District violated the collective bargaining agreement, particularly Article 10, Section 2.D.1., when it assigned James Kivisto to teach a sixth class, i.e. grade 6 physical education for the 2004-2005 school year. The Association argues there was such a violation while the District takes the opposite position.

The Association argues that irregardless of how you frame the issue there are two fundamental questions that need to be decided in this particular case: one, is the overload (sixth class) in special education or physical education; and two, if it is deemed to be special education, as it should be, did the District do everything possible to avoid a scheduling conflict?

The Arbitrator first turns his attention to the question of whether the sixth class is in special education or physical education.

The grade 6 physical education class was added to the schedule in order to accommodate students in the sixth grade who needed to take physical education. However, the

Association argues that the sixth class was in the area of special education, not physical education, because James Kivisto always had one physical education class as part of his assignment from the time he started with the District. Therefore, according to the Association, if the sixth class was in physical education Kivisto should have had an additional physical education class for 2004-2005 but he didn't.

It is true that James Kivisto has always had one physical education class as part of his assignment from the time he started with the District in the 2002-2003 school year. However, his class schedule was not always the same from school year to school year. Nor was he guaranteed a physical education class as part of his teaching load (normally five classes or supervisory duties) for a school year. To the contrary, Kivisto's preliminary schedule for the 2004-2005 school year included five periods of classroom teaching, plus Senior High Duty and a Prep Period but no physical education class. Only during the process of finalizing the schedule for the 2004-2005 school year did it become apparent to the District that the grade 6 physical education schedule could not be met without assigning Kivisto a sixth class, a grade 6 physical education assignment. Thus, whether or not Kivisto has had a physical education class as part of his assignment historically or for the 2004-2005 school year prior to the disputed assignment is not determinative of whether the class in question is special education or physical education but only goes to the question of the number of periods of classroom teaching or supervision he carried.

In the instant dispute, the District was attempting to get a teacher assigned to the 6th grade P.E. because that was where the need was for an additional class. The Association offered no persuasive evidence to the contrary.

The Association concedes that the overload (sixth class) "must be in the area of the Charter School." However, during the 2002-2003 school year the at-risk, Charter School and EBD duties were consolidated and assigned to two teachers, David Betlewski and James Kivisto, who shared a class room. Prior to the start of the 2003-2004 school year, Betlewski left the District and all of the Charter School duties and the EBD duties were consolidated in Kivisto's position. As pointed out by the District, EBD certification is required for the Charter School assignment and the Grievant is not licensed as an EBD teacher. Nor is she certified to teach physical education.

Based on all of the above, I find that the sixth class is in physical education and the Grievant is not certified to teach it.

However, assuming *arguendo* that the class was in special education the Association's case still must fail.

The Association argues that, contrary to the District's assertion, there was no scheduling conflict that prevented the District from assigning the disputed class to the Grievant. In support thereof, the Association maintains that the schedule could have been constructed prior to the beginning of the school year in question to accommodate the

contractual requirement that the employer attempt to write the schedule to include that 6th class for the senior staff member prior to implementation. The Association also claims that the District should have talked to the Grievant earlier in the scheduling process in order to work out any potential conflicts in assigning her the class.

However, there is no evidence that the District followed anything other than its normal scheduling process or acted in an arbitrary, capricious or bad faith manner when it assigned James Kivisto to teach a grade 6 physical education class, instead of the Grievant, for the 2004-2005 school year. The District did construct a schedule prior to the start of the school year as requested by the Association. This occurred in the spring of 2004 well before the start of the new school year and was no different than what the District had done in the past. The District first attempted to schedule five classes for all teachers, and both the Grievant and Kivisto were initially assigned five classes. Student needs then dictated that the District create another grade 6 physical education class and consistent with its policy of having all grade 6 physical education classes be taught by an elementary physical education teacher Kivisto was eventually assigned the class. There is no evidence that the District went out of its way to deny the Grievant the assignment. Nor is the District contractually obligated to consider assigning the Grievant a sixth class prior to considering and meeting student needs.

Even if the District had the ability to assign the Grievant to the grade 6 physical education class 7th period in lieu of her study hall supervision, this would not have worked. Pulling someone like the Grievant off of study hall supervision was not acceptable due to safety concerns. The District did not have enough teachers to provide supervision for study halls and lunch time due to lower staff levels.

Based on all of the above, the Arbitrator finds that the answer to the question as framed by the District is NO, the District did not violate the collective bargaining agreement when it assigned James Kivisto to teach a sixth class, i.e. grade 6 physical education for the 2004-2005 school year.

Based on all of the foregoing, it is my

## AWARD

The instant grievance is hereby denied, and the matter is dismissed.

Dated at Madison, Wisconsin, this 3rd day of October, 2005.

Dennis P. McGilligan /s/
Dennis P. McGilligan, Arbitrator

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